No. 2719.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit.

Before Judges Gilbert, Ross and Morrow.

SANTA CRUZ DEVELOPMENT COMPANY,

Appellant,

against

CORNELIUS C. WATTS *et al.*,

Appellees.

Petition of Santa Cruz Development Company for Rehearing or for the Certification of Questions to the United States Supreme Court.

G. H. BREVILLIER,
Counsel for said Appellant and Petitioner.

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT.

SANTA CRUZ DEVELOPMENT COMPANY, Appellant, against CORNELIUS C. WATTS, *et al.*, Appellees.	No. 2719.

Petition of Santa Cruz Development Co. for Rehearing and Reconsideration, or for the Certification of Questions to the United States Supreme Court.

To the HON. WILLIAM B. GILBERT, HON. ERSKINE M. ROSS and HON. WILLIAM W. MORROW, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the appellant, Santa Cruz Development Company, by its counsel, and applies for a rehearing and a reconsideration by this Court of its opinion and the judgment and decree thereon, or for the certification by your Honors to the United States Supreme Court of the questions in this case, pursuant to Section 239 of the Judicial Code, and assigns the following reasons therefor:

FIRST. The decision of this Court on the Hawley deed is based upon an obvious misreading of Lane v. Watts.

SECOND. This Court entirely misconstrued the Prentice cases.

THIRD. This Court had no right in law or in fact to make any use of the Wrightson title bond.

FOURTH. Even under the falso demonstratio rule the Hawley deed conveyed and was intended to convey only the 1866 location.

For four years I have been studying the questions involved herein and those involved in *Lane v. Watts* (234 U. S. 525; 235 U. S. 17). From the fact that I made an argument in *Lane v. Watts* in three courts in 1913 and 1914, and prepared and filed briefs in each court, I can justly claim a familiarity with that case and the questions involved therein.

I wish to assert with the utmost positiveness that the premises upon which this Court construed the Hawley deed find absolutely no support in *Lane v. Watts*, and that none of the questions involved herein was passed upon in any way by the United States Supreme Court. As a matter of fact all the counsel for the appellees in that case signed and filed in the Supreme Court a joint supplemental brief in which it was stated:

> "None of the counsel for the appellees seeks or desires any expression from the Court as to the relative rights of the appellees as there is no such question in the case."

Certainly the 1866 selection was not mentioned in either opinion of that Court and the quotations therefrom by Judge Ross refer to an entirely different subject-matter. None of the counsel for the successful parties in this case made the

slightest claim herein, on argument or in their printed briefs, that *Lane v. Watts* passed in any way upon the 1866 selection or any question relating thereto.

The questions involved in this case are so complex and have such intimate relation to the Public Land Laws of the United States, and are based so much on decisions of the United States Supreme Court with reference to the grant and similar grants, that the quickest and most practical solution for all concerned would be for your Honors to certify the questions herein to the United States Supreme Court, under Section 239 of the Judicial Code, as the Supreme Court will undoubtedly review the decree of this Court on certiorari or appeal.

The certification of questions will quickly bring this difficult and complicated case to a final conclusion, as the Supreme Court would then unquestionably order up the entire record under its Rule No. 37, and we would apply for the advancement of the case.

We would appreciate as early a decision hereon as permitted by the demands upon your Honors' time and the care with which you consider all matters before you.

Argument.

I.

The decision of this Court is based upon an obvious misreading of Lane v. Watts.

The view which this Court took of the selection of 1866, is based on a radical misconception of the decisions of the United States Supreme Court in *Lane v. Watts*, 234 U. S. 525; 235 U. S. 17.

Judge Ross said herein:

> "We think that this decision of the Supreme Court leaves no ground for the contention that there was any

> validity in the subsequent attempt to change the boundaries of the Baca Float #3 grant, either on behalf of the grantees or on the part of any official of the Land Department * * * and there was, therefore, no authority in any officer of the Land Department to make or permit to be made any change in the location or boundaries of what had theretofore been Baca Float #3. Such being the express decision of the Supreme Court in *Lane v. Watts* above cited it is needless to comment any further upon that question."

In neither of the two Supreme Court opinions in *Lane v. Watts* was the selection of 1866 passed upon in any way; the Bill therein did not even mention it.

The only thing in either opinion in that case which has the slightest bearing upon the 1866 selection is the following extract from the first opinion (234 U. S. 525, 541):

> "A point is made upon attempts to change the location, of which it is enough to say that they were not accepted by the Land Department and the claimants were remitted to the location under consideration."

This certainly shows that the Supreme Court recognized the right of the Land Department to pass upon such applications.

The claimants of the 1866 selection "were remitted to the (1863) location under consideration" on July 25, 1899, by the decision of the Secretary of the Interior (29 L. D. 44; initialed by Mr. Justice Van Devanter, then in the Interior Department). That decision expressly recognized a right to make an actual amendment after the expiration of the three years allowed by the act of 1863, but held as a fact and for the first time that the 1866 selection, because of the diagram then before the Secretary of the Interior, was not an amendment of the original location, but an attempt to substitute a new selection. In 1887, Secretary Lamar (afterwards a Justice of the Supreme Court), refused an application for a re-

location of the grant and held the parties to the selection "as amended" in 1866 (5 L. D. 705).

As pointed out in my reply brief (pages 7 and 8), the Commissioner, as the representative of the United States in the administration of the Land Laws, had full power to allow an amendment of the location of 1863, unless and until overruled by the Secretary of the Interior prior to the passing of legal title of the amendatory location.

The Commissioner on May 21, 1866, approved the change in the location, provided that a survey should determine that the new selection was vacant land not mineral. *Valid or invalid, that was the actual situation and those "the facts and circumstances" in 1870, when Watts made his deed to Hawley.* Such was the title to the 1866 selection which Watts quitclaimed to Hawley. The 1866 selection, whether valid or void *ab initio*, was an actual tract and something which Watts could quitclaim. His deed to Hawley correctly states his supposed chain of title. *Watts and Hawley were dealing with the actualities of 1870, and not with reference to any constructive legal situation first created in 1899.*

From the application for the amended location made on April 30, 1866, it is clear that John S. Watts at that time did not desire the 1863 tract, but desired something entirely different therefrom. If he did not desire the 1863 tract, and quitclaimed to Hawley what he in fact really desired and to which in fact both believed he had secured a conditional title, the natural and logical conclusion is that his deed to Hawley cannot be held to convey land which Judge Watts did not wish to own and certainly did not wish to sell.

> "If a person supposing he is possessed of a specific tract of land in a certain neighborhood should contract for the sale of that land to another it does by no means follow that he would have sold him any other

> tract, in the same vicinity, to which, without his knowledge, he was then entitled, much less than he would have sold it for the same price" (*Russell v. Trustees,* 1 Wheat. 432).

Further on in the opinion herein Judge Ross states:

> "It will be at once seen that the specific description in this (Hawley) deed is that of the attempted location of 1866, adjudged void by the Supreme Court in the case of *Lane v. Watts, supra,* and as to which specifically described tract the grantor had no title except to a narrow strip thereof covered also by the 1863 location of the grant."

Here again, Judge Ross makes the same error as to the decision of the Supreme Court in *Lane v. Watts,* and he also overlooks the fact that if the Commissioner or the Secretary or both had finally approved the 1866 location, neither he nor any other jurist would have any right to review such action, except for fraud of those officers. The Land Department is not only an administrative body but also a *quasi* judicial tribunal.

Judge Ross also overlooked the fact that the 1866 location was in form at least "granted" *conditionally* by the Commissioner in 1866. If it was not a "grant" in form, then the Commissioner's approval of the 1863 location on April 9, 1864 was not a "grant." The real "grant" was in an act of Congress which described no land at all. If the absolute approval of Commissioner Edmunds on April 9, 1864 was a "grant" then the conditional approval of the same Commissioner in May, 1866, of the amended location was a "grant," at least until overruled by the Secretary of the Interior in 1899. It is clear that both parties to the Hawley deed believed that the Commissioner's action in 1866 was a "grant." It is admitted that the claimants under Hawley strenuously asserted that it was a "grant" continuously thereafter until

as late as 1901, when Mathews and Syme, the Hawley claimants, made their earnest appeal to the Secretary that he overrule his decision of July 25, 1899 (Record, pp. 7, 394 to 398).

Furthermore, this Court clearly misconceived the quotation from *Lane v. Watts*, appearing on page six of the tyewritten copy of the opinion herein furnished us by the Clerk:

> "The title having passed by the location of the grant and the approval of it, the title could not be subsequently divested by the officers of the Land Department. In other words, and *specifically* the action of the Commissioner in approving the location of the grant cannot be revoked by his successor in office and an attempt to do so can be enjoined."

The quotation in question was from page 540 of the first opinion of the Supreme Court and had reference, as will be seen by the preceding pages of the same opinion and from the allegations of the Bill therein, to the attempt of the officers of the Land Department, *after the Contzen survey in 1905*, and against the protest of the grant claimants, to overrule the action taken by Commissioner Edmunds on April 9, 1864, and not to the action of the same Commissioner on May 21, 1866, in conditionally allowing an application to amend the selection.

The only mention made by the Supreme Court of any attempted changes in location is the passage heretofore quoted from page 541 of the first opinion, and that recognized the jurisdiction of the Department.

Lane v. Watts was instituted for the purpose of enjoining the officials of the Land Department from attempting, *subsequent to 1905 against the protest of the grant claimants,* to revoke or review the Commissioner's action of April 9, 1864, and to secure the filing of the plat of survey; and for no other purpose. The Government officials brought out the various attempts to relocate simply to make a far-fetched argument

that none of the claimants then believed that the Commissioner's action of April 9, 1864, passed title.

I have a bound copy of the Supreme Court record in *Lane v. Watts,* and also a bound copy of the record and all briefs. I shall be glad to submit both or either of these to your Honors if the Clerk will telegraph me at my expense.

II.

This Court entirely misconstrued the Prentice cases.

This Court clearly misread the Prentice cases. It failed to notice that in those cases the Court first and primarily held at the outset that the *metes and bounds controlled in any event;* and then, secondly, *that even if the specific description could be rejected,* Prentice would not have what he desired.

Both the Circuit Court and the United States Supreme Court in the second Prentice case found it "difficult to imagine" that anything but the specific metes and bounds could be meant to pass. The subsequent discussions in the opinions were expressly hypothetical and answers *in limine* to the contentions of Prentice, *even if it were possible to reject the metes and bounds.*

The years of study we have given the Prentice cases warrant us asking of this Court a careful consideration of the following argument:

The actual decision in the Prentice cases can be best ascertained in the following extracts from *Prentice v. Northern Pac. R. R. Co.,* 43 Fed. 270, in which the opinion by Mr. Justice Miller, then senior associate Justice of the Supreme Court, sitting at Circuit, *was adopted by the Supreme Court* and quoted at great length in 154 U. S. 163:

"The first descriptive clause of the deed from Armstrong to Prentice is of a tract of land a mile square, beginning at a large stone or rock, which, as a matter of fact, we find in the present case is now identified and was well known at the time the deed was made. The description proceeds with the points of the compass one mile east, one mile north, one mile west, one mile south, to the place of beginning. *It would be difficult, the beginning point being well ascertained, to imagine that Armstrong intended to convey any other land, or any other interest in land, or interest in any other land, than that so clearly described. And if that description is to stand as a part of the deed made by Armstrong to Prentice, it leaves no doubt where the land was; and there is no occasion to resort to any inference that he meant any other land than that.*

"It is now found as a fact that this boundary would include a surface from one-half to three-fourths of which is land and the remainder is water of Lake Superior. For that reason, and for others which may be hereafter considered, *counsel for plaintiff* reject totally this part of the description of the land found in the conveyance, and proceed to consider the remaining part, which says:

" 'Being the land set off to the Indian Chief Buffalo at the India treaty of September 30, A. D., 1854, and was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded with the government documents.'

"*If we could reject the first description as incorrect and erroneous, and come to the latter part of it,* we are constrained to hold that this alone is not sufficiently certain to convey any definite tract of land one mile square, or nearly so. * * *

"To avoid this difficulty, counsel insists * * * that the reference to the land set off to the Indian Chief Buffalo at the treaty of 1854 meant, not any definite

piece of land, but any land which might come to Buffalo or to his appointees, of whom Armstrong is one, by the future proceedings of the government of the United States in that case; and that, no matter where such land was found, provided it was within the limits of the land granted by the Chippewa treaty, then the deed from Armstrong to Prentice was intended to convey such after-acquired interests when it was patented to the parties by the United States. We do not see anything in the whole deed or transaction between Armstrong and Prentice that points to or indicates any such construction of it.

"Both clauses of the description are definite as to the land conveyed, and treat it as a piece of land well described, well known, and well defined. Of course, any man endeavoring to ascertain what land was conveyed under that grant would suppose that, when he found the stone or rock, which we now, as a matter of fact, find to have an existence, and can be well identified, he had bought a mile square according to the points of the compass, the southwest corner of which commenced on that rock. He would not suppose that he had bought something that might be substituted in lieu of that mile square by future proceedings of the government of the United States. * * *

"Much stress is laid upon cases found in the Supreme Court of the United States, referred to in the case of *Prentice v. Stearns*, already decided. *Between the cases of Doe v. Wilson, and Crews v. Burcham and this, a broad difference exists. The lands reserved by treaty in those cases to the parties who conveyed their interests to others never had been described, never had been selected, and it was only known that they would be entitled to a certain amount of land afterwards to be selected by the president under that treaty.* * * *

"But *in the case before us, not only had Buffalo made his selection, and designated the parties to whom the land should go, but the selection had definiteness about it to a certain extent; it was a thing which could*

> *be conveyed specifically, and which Armstrong undertook to convey specifically. It is not necessary that we resort to the supposition that Armstrong was talking about some vague and uncertain right—uncertain, at least, as to locality, and as to its relation to the surveys of the United States—which he was intending to convey to Prentice, instead of the definite land which he described or attempted to describe. If such were his purpose in this conveyance, it is remarkable that he did not say so in the very few words necessary to express that idea, instead of resorting to two distinct descriptive clauses, neither of which had that idea in it."*

Thus it will be seen that the Court *decided first* that the specific description, by metes and bounds from a well ascertained beginning point, controlled the deed and fixed the extent of the conveyance; and that even

> "*if we could* reject the first description as incorrect and erroneous, and come to the latter part of it,"

even then there would be no merit in the contentions of Prentice, as a literal reading of the general words would not, in any event, convey either the land which Prentice desired or the general rights. In other words, after deciding (43 Fed. 270, 274; quoted in 154 U. S. 163, 173), that

> *"it would be difficult, the beginning point being well ascertained, to imagine that Armstrong intended to convey any other land, or any other interest in land, or interest in any other land than that so clearly described"*

by metes and bounds, the Court said that *even "if we could reject" the metes and bounds,* it was a sufficient answer *in limine* that the general words, from the literal way in which the Court construed them, did not convey either what Prentice desired or the general rights under the treaty.

The Court, therefore, answered Prentice in two ways: first, that the specific description "leaves no doubt where the

land was," and the deed must be held thereto; and second, even *"if we could reject the first description as erroneous,"* the necessarily literal construction of the general words did not give Prentice what he wanted.

Justice Miller's use in 43 Fed. 270, 274, of the *conditional premise,*

> "If we could reject the first description as incorrect and erroneous,"

was neither inadvertent nor accidental. In the first Prentice case (20 Fed. 819, 823) he likewise held himself bound by the specific description, and that even if he could reject it, he would be unable to accept Prentice's construction of the general words. The Justice said (p. 823):

> "This is the meaning of the language, and to put any other construction upon it is (1) to strain a point, and (2) *to suppose it possible to strike out that first portion of the deed which gives a clear description of the land and its location and its boundaries.*" (Parenthetical numbers and italics are ours.)

Justice Miller refused to "strain a point" by giving Prentice the general rights which Armstrong actually received from his grantors or the indemnity land which the United States gave Armstrong. Justice Miller also refused "to strike out * * * a clear description of the land, its location and its boundaries," even though those boundaries were of a tract of land never selected and largely under water. At bar, this Court has certainly been moved both "to strain a point" and to disregard the metes and bounds of an actual tract, actually selected and actually deemed validly located at the time.

Justice Miller and the Supreme Court found it "difficult" even "to imagine" that anything else but the metes and bounds passed to Prentice. This Court found no such mental difficulty and eliminated a correct description of an actual tract,

which Hawley's grantees repeatedly admitted was all they desired or had purchased.

Thus it will be seen that the *actual decision* in the Prentice cases was:

1. The specific description controlled the deed; and

2. Even if it were possible to reject the metes and bounds, the general words, in their necessarily strict literal construction, did not give what Prentice sought.

The same test of literal construction which Justice Miller applied at Circuit in the second Prentice case, in refusing (*even if he had the right*) to construe the words "set off to the Indian Chief Buffalo at the Indian Treaty" to mean the general right of selection given by the treaty and "afterwards disposed of by said Buffalo to said Armstrong," is decisive in the case at bar that *the specific conveyance of a specific selection under a grant does not convey another specific selection, which is subsequently decided to be the valid location.*

To paraphrase Justice Miller's opinion (quoted in 154 U. S. 163, 174):

> "The selection (of 1866) had definiteness about it to a certain extent. It was a thing which could be conveyed specifically and which (Watts) undertook to convey specifically. (Hawley) would not suppose that he had bought something which might be substituted in lieu of that * * * by future proceedings of the government of the United States. * * * If such were (the grantor's) purpose in this conveyance, it is remarkable he did not say so in the very few words necessary to express that idea. * * * It would be difficult, the beginning point being well ascertained, to imagine that (Watts) intended to convey any other land, or any other interest in land, or interest in any other land, than that so clearly described."

All this is further brought out by the cases which Justice

Miller distinguishes, namely, the two cases where there had been no specific selection and, therefore, a general conveyance passed the ultimate location. Justice Miller and the Supreme Court pointed out in the second Prentice case,

> "not only had Buffalo made his selection, and designated the parties to whom the land should go, but the selection had definiteness about it to a certain extent; *it was a thing which could be conveyed specifically, and which Armstrong undertook to convey specifically.*"

In the Prentice cases, as well as the case at bar, both parties believed the specific description correctly described a tract which the grantor had some right to convey under a grant or a supposed grant.

Furthermore, in the Prentice case, about one-half of the land specifically described was under the waters of Lake Superior, showing mistake of some kind; and the selection by Buffalo was simply of a mile square,

> "the exact boundary of which may be defined when the surveys are made, lying on the west shore of St. Louis Bay, Minnesota Territory, immediately above and adjoining Minnesota Point."

In the case at bar the metes and bounds of the Hawley deed accurately describe the selection of 1866 and an actual tract of valuable land.

The Court in the Prentice cases said that if the rights to land ultimately allotted to the grant had been intended to pass,

> "it is remarkable that he (Armstrong) did not say so in the very few words necessary to express that idea,"

although the recited deed wherein the land

> "was afterwards disposed of by said Buffalo to said Armstrong"

contained no metes and bounds, but simply conveyed the general rights. If the recited deed in the Prentice deed—which in fact conveyed the general rights desired by Prentice and which Armstrong afterwards solemnly admitted in writing (154 U. S. 163, 166 to 168) were intended to pass to Prentice—did not operate to pass those general rights, how can it been said that the recited deed in the Hawley deed has that effect?

If the metes and bounds, though largely under water, controlled in the Prentice cases, erroneously used as they were to describe the supposed location of the grant, why do not the metes and bounds control at bar, describing as they do one of two *actual* locations of the grant, and one which was then, and until 1899, supposed to have at least some validity?

If the words "set off to the Indian Chief Buffalo" did not supersede the metes and bounds, how can the parenthethical words at bar in a *separate sentence:*

> "The said tract of land being *known* as location No. 3 of the Baca series,"

have such an effect, especially when the bill herein declares and the uncontradicted testimony shows that the metes and bounds of the 1866 location were in fact "known as location No. 3 of the Baca series" at the time of the Hawley deed and for many years thereafter?

In the Prentice cases, the words,

> "Being the land set off to the Indian Chief Buffalo at the Indian Treaty of September 30, A. D. 1854"

were held not to nullify the specific description and even not to refer to what was actually given Buffalo at the treaty, namely, a right to select a section of land. How then, can it be said that the words in the Hawley deed, "granted by the United States to the heirs of Baca" nullify the metes and bounds, especially when the United States herein through its

proper officer made a conditional grant of the specific description of the 1866 selection which was supposed to be valid until 1899, and the 1863 selection was repeatedly declared by the Land Office to be an unapproved grant until the decisions in *Lane v. Watts?*

How is it possible for this Court to hold that a conveyance in 1870 by metes and bounds of an actual tract, which was then actually deemed a valid conditional location of the grant, conveyed another tract which many years thereafter was held to be the only valid location?

How can a conveyance of one tract by metes and bounds convey on its face, not only the land specifically described, but another tract also?

This Court entirely lost sight of the fact that the metes and bounds of the Hawley deed correctly describe an actual tract of land, a tract in which the grantor then had or was supposed to have some interest. If the wrong tract was described, the remedy is a suit for reformation (*Prentice v. N. P. R. R. Co.*, 154 U. S. 163, 176). A deed of specific metes and bounds cannot be held an ambulatory conveyance whose subject-matter shifts as Sahara sands in a desert storm.

To paraphrase again Justice Miller and the Supreme Court in the second Prentice case:

> "The grantor in that (Hawley) deed supposed he was describing a specific piece of land, and that both the description by metes and bounds and the description with reference (to the grant and the title out of the Baca heirs) were the same, and identical."

As Judge Ross well said, only one tract was meant to pass. It follows inevitably that what was specifically described by metes and bounds was the specific object of the conveyance, under the well-known rule that what is most specifically set forth is the clearest evidence of intent. To say otherwise here-

in will overrule the Prentice cases, overrule every canon of construction and disregard every principle of common sense.

III.

This Court had no right in law or in fact to make any use of the Wrightson title bond.

This Court relied upon the Wrightson title bond as evidence of the intention of the grantor in a deed to another party executed seven years after the bond.

On pages thirty to thirty-seven of my main brief I point out how untenable in law and unwarranted in fact is any attempt to use the Wrightson title bond to construe the Hawley deed.

This Court states that the record shows that subsequent to June 17, 1863:

> "Wrightson, to whom Watts had for a large consideration agreed to convey in advance of its location the float then claimed by him, found upon examination that most of the land intended to be included in the location made by Watts in 1863 had been left out by mistake * * * The specific description of which latter attempted amended location was * * * inserted in the deed from Watts to Hawley, the assignee, through various mesne conveyances of the interest of Wrightson."

There is absolutely no evidence in this case that the Wrightson title bond applied to Baca Float No. 3, or any location of it. As a matter of fact, No. 5 was also "unlocated" at the time of the Wrightson bond. Furthermore, Wrightson died before the 1866 location was made (Record, p. 176)

The statement that Hawley was "the assignee through vari-

ous mesne conveyance of the interests of Wrightson," is absolutely without any support in the record. No assignment out of Wrightson was even attempted to be proved (Main Brief, p. 30).

If, as Judge Ross suggests, Wrightson or any of his alleged assignees did not want the 1863 tract but picked out through Judge Watts another tract of land and had him describe that in a quitclaim deed to Hawley, then it is difficult to see how the Hawley deed can be held to cover on its face land which Wrightson did not want, instead of land which, as this Court says, Wrightson picked out on the ground and his alleged assignee had inserted in the Hawley deed.

IV.

Even under the Falso Demonstratio Rule the Hawley deed conveyed and was intended to convey only the 1866 location.

Judge Ross's quotation from Broom's Legal Maxims as to *the falso demonstratio rule is expressly limited therein to cases where the false part of the description applies to no subject and the true part to one subject only, and then the Court "rejects no words but those which are shown to have no application to any subject."*

In our case, the specific description certainly applied only to the 1866 tract, an actual tract, and one which was conditionaly approved by the Commissioner in 1866, and which the Hawley title claimants as late as 1901 insisted was just what they desired.

As pointed out in my main brief (pp. 64 to 68), the title references in the Hawley deed can refer to both the 1863 and 1866 tracts. The statement of locality refers to the 1866

tract alone, as will be shown by the map. The statement of tract name refers, from the allegations of the bill and the uncontradicted evidence herein, only to the 1866 tract. It will be seen, therefore, that the quotation as to the *falso demonstratio* rule entirely negatives any authority in the Court to make the decision which it has rendered.

The *falso demonstratio* rule never applies where the specific description correctly describes some tract.

> *Washburn on Real Property*, 6th Ed., Sec. 2319.
> *Tiedeman on Real Property*, 2nd Ed., Sec. 829.
> *Prentice v. N. P. R. R. Co.*, 154 U. S. 163, 176.
> *Russell v. Trustees*, 1 Wheat. 432, 436, 437.
> *Muto v. Smith*, 55 N. E. 1041; 175 Mass. 175; opinion by Mr. Justice Holmes.
> *Cassidy v. Charlestown Bank*, 21 N. E. 372; 149 Mass. 525.

If through inadvertence the wrong tract has been specifically described, the grantee must have the deed reformed.

> *Prentice v. N. P. R. R. Co.*, 154 U. S. 163, 176.
> *Cassidy v. Charlestown Bank*, 21 N. E. 372; 149 Mass. 525.
> *David v. George*, 134 S. W. 326; 104 Tex. 106.

The alleged "false part" in the Hawley deed applies to and correctly describes an actual tract, one to which the grantor was then supposed to have some title, and which his grantees claimed continuously and strenuously until as late as 1901. The alleged "true part" instead of applying to "one subject only" applies to the land specifically described in the Hawley deed, as well as to the 1863 tract. Even under the rule invoked by the Court, the Hawley deed must be held to the metes and bounds thereof.

Of course, the intention of the grantor in the Hawley deed must be obtained from the deed itself. On pages 70 and 71 of my main brief, I point out why Hawley wanted the 1866

tract and that alone; and on pages 72 to 75 of the same brief, I show how the parties and their successors in interest construed it.

As an actual tract was accurately described, a tract in which the grantor had some interest or supposed interest at the time, no construction of the deed is necessary, especially in view of the unquestioned rule that the specific description controls in a deed (Main Brief, pp. 37 to 49).

But let us read the deed and see what it means:

> "All that certain (*not floating or shifting, but certain*) tract, piece or parcel of land, lying and being in the Santa Rita mountains (*by looking at the map opposite page 6 of my main brief it will be seen that the 1866 tract is certainly in those mountains and the 1863 tract is not*) in the Territory of Arizona, U. S. A., containing 100,000 acres of land more or less (*both tracts contain the same acreage*), granted to the heirs of Luis Maria Cabeza de Baca by the United States (*the 1866 tract, as heretofore explained, was certainly granted in form at least by the United States to the Baca heirs in 1866, and was supposed to have been validly granted until after 1899*) and by the said heirs conveyed to the party of the first part by deed dated on the first day of May, A. D. 1864 (*whatever right Judge Watts had to the 1866 tract passed to him under that deed, because if he finally secured title to the 1866 tract it would only be on a surrender of his rights to the other tract, just as the assignment of a chose in action vests by implication alone in the grantee the right to use the name of the grantor for all purposes of procedure*), bounded and described as follows (*the metes and bounds need not be repeated because admittedly they refer only to the 1866 tract, an actual tract of valuable land*). The said tract of land (*namely, the tract just specifically described*) being known as location number three of the Baca series (*not known as that in the deed to the grantor; not known as such*

in the grant from the United States, for three different tracts have borne that name; but known by that name at the time of the deed; and from the bill herein, the maps and the uncontradicted testimony only the specifically described tract—only the 1866 tract—was 'known as location number three of the Baca series' at the time of the deed)."

What is there difficult about the deed? Why is there any need for construction or the citing of authorities or the writing of long opinions? The deed is so simple that a child can read it and know just what it means. Its form, contents and double acknowledgment show the art and skill of a careful conveyancer. Difficulty and obscurity must be injected into the deed, for its language is clear, accurate and precise. Desperate efforts and involved arguments are necessary to make its simplicity complex or its meaning anything but plain.

Hawley had a very apparent design and a very important object in endeavoring to secure only the land in the amended location. He knew it was different from the 1863 location; a mere inspection of a map or the deed from the Baca heirs to Judge Watts would demonstrate that. Certainly Hawley made some examination of map or title before he "bought." The 1866 tract is mountainous mineral land, the kind of land which Hawley knew he had no right to take under the Act of Congress; but he wanted that mineral land. Judge Watts, knowing the condition attached to the approval of the selection thereof, would give only a quitclaim deed. Hawley's purpose in having the 1866 tract specifically described is too obvious to require argument: he wanted mineral land. In those days, in the absence of railroads, with the Apaches a constant menace, only the lure of mineral would tempt anyone to go to southern Arizona. If the 1866 selection had been finally approved, certainly no one would contend that the deed covered the 1863 tract and not the 1866 tract; how then, can the final disapproval of the 1866 selection change the deed?

The Court's construction of the deed requires the arbitrary elimination of the metes and bounds. Those metes and bounds were inserted, not as an empty formality but for a very obvious purpose. They were used to show an intent that the 1863 tract of valley land should not pass, as all its water and all its agricultural land were then usurped by the holders of Mexican grants, and no Eastern investor or speculator would take anything but mineral land. This explains why the statement of tract name was so carefully worded and so carefully separated from the recital of the deed to the grantor.

For some reason, probably to protect some mining operations, Hawley wanted a quitclaim of Judge Watt's rights in the 1866 tract, but did not consider the title under the deed of sufficient importance to record it until fifteen years thereafter. The witness Magee had charge of the 1866 tract for many years for a mining company and met Hawley on the ground, and tried to get the Surveyor-General of Arizona to survey it. The witness frankly said he had nothing to do with the 1863 tract. How then, can it be said that the grantor and grantee intended the 1863 tract to pass, and not the 1866 tract which they so carefully described?

If the 1866 tract was in the minds of the parties when the deed was executed, and every indication therein shows that it was, then that tract alone passed; otherwise no lawyer may hereafter believe his eyes when he reads a deed or trust his judgment when he draws one.

This Court failed to explain in its opinion how, if the words of grant and conveyance to Watts control in the Hawley deed, that the subsequent deeds in the same chain of title which omit those words can pass anything but the land specifically described, especially where such deeds convey selected parts of the 1866 tract in partitions and even specifically say that the metes and bounds are correct. The Court's own

argument demonstrates that the successful parties herein have no title.

I understand that Mr. Franklin is applying for a rehearing on the ground that this Court did not pass on the questions of adverse possession in its opinion. I discussed the subject of adverse possession in my supplemental brief. The counsel for Watts and Davis and the Bouldins also discussed the subject in their main briefs.

The decision of the Court on the Hawley deed is erroneous and should be withdrawn.

Respectfully submitted,

G. H. BREVILLIER,
Counsel for Santa Cruz Development Company.

January 29, 1917.

Certificate of Counsel.

I hereby certify that I am of counsel for Santa Cruz Development Company, appellant and petitioner herein; and that in my opinion and judgment the foregoing petition for a rehearing, etc., is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

G. H. BREVILLIER,
Counsel for said Appellant
and Petitioner.